LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
NOV 22 1961
JOHN F. DAVIS, CLERK

No. 569

IN THE

Supreme Court of the United States

OCTOBER TERM 1961

I. L. F. Y. Co.,

Appellant,

—against—

THE TEMPORARY STATE HOUSING RENT COMMISSION and MARY ALICE JONES,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

ROBERT S. FOUGNER
Attorney for Appellant
17 East 49th Street
New York 17, New York
PLaza 1-1760

McLAUGHLIN & FOUGNER and
ALBERT W. FRIBOURG
Of Counsel

INDEX

PAGE

JURISDICTIONAL STATEMENT

(a) Report of Opinions in Courts Below 1

(b) The Jurisdiction of This Court Is Based on the Following: 2

i 2

ii 3

iii 3

iv 3

(c) Quesions Presented by This Appeal 4

(d) Statement of the Case 5

(e) The Federal Questions Are Substantial 16

APPENDIX

Exhibit 1—Opinion of Court of Appeals 1a

Exhibit 2—The Opinion at Special Term of Judge Greenberg 9a

Exhibit 3—Challenged Provisions of the Statute 11a

Exhibit 4—Order of Remittitur 12a

Exhibit 5—Order on Remittitur 14a

Exhibit 6—Interpretative Letter of the Temporary State Housing Rent Commission (Appellee) 16a

Exhibit 7—Appellee's Operational Bulletin Staying Final Action on Fair Return Cases 19a

Authorities

PAGE

Cases:

Anderson v. Mt. Clements Pottery Co., 328 U. S. 680 30

Block v. Hirsch, 256 U. S. 135 18
Bowles v. Willingham, 321 U. S. 503 .....16, 17, 26

Diamond v. State Rent Commission, 198 N. Y. S. 2d 735 31

East New York Savings Bank v. Hahn, 326 U. S. 320 3

Matter of Ackerman v. Weaver, 6 N. Y. 2nd 283 .....9, 18
Matter of DiVarco v. McGoldrick, 281 App. Div. 955 7
Matter of Florell v. Weaver, 155 N. Y. S. 2nd 222, aff'd 2 A. D. 2nd 541, unan. aff'd 2 N. Y. 2nd 982 .....7, 8, 27
Matter of Realty Agency Inc. v. Weaver, 7 N. Y. 2nd 249 .....9, 10, 23
Municipal Gas Co. v. Public Service Commission, 225 N. Y. 89 19

Paulos v. New Hampshire, 345 U. S. 395 3
Pennsylvania Coal Company v. Mahon, 260 U. S. 393 3

315 West 97 St. Corp. v. Bowles, 156 Fed. 2nd 982, cert. den. 329 U. S. 801 5
Teeval Co., Inc. v. Stern, 301 N. Y. 346 .....6, 18

Wasservogel v. Meyerowitz, 300 N. Y. 125 .....6, 30
Woods v. Miller, 338 U. S. 138 17

U. S. v. New York Central Railroad, 279 U. S. 73 28

PAGE

Other Authorities:

Emergency Housing Rent Control Law of the State of New York:

Chapter 274, Laws of 1946, last amended effective June 30, 1961, by Chapter 337, Laws of 1961 4
Chapter 274, Laws of 1946, as amended by Chapter 250, Laws of 1950 6
Chapter 443, Laws of 1951 6
Chapters 320 and 321, Laws of 1953 6
Chapter 685, Laws of 1955 6
Chapter 755, Laws of 1957 8
Chapter 337, Laws of 1961 15

Federal Housing & Rent Act of 1949:
50 U. S. C. A. App. 1894 Section 204J 6

McKinneys 1957 Session Laws at 1548 9
McKinneys 1961 Session Laws, pp. 1986-95 .....12, 22
(Gaynor Report)

28 U. S. C., Section 1257(2) 15

29 U. S. C. A., Section 251 30

N. Y. Times, October 30, 1961, p. 1 27

Survey Report on the Rental and Housing Market
(Herman Report) 10, 12

IN THE

Supreme Court of the United States

OCTOBER TERM 1961—NUMBER .....

I. L. F. Y. Co.,

Appellant,

—against—

THE TEMPORARY STATE HOUSING RENT COMMISSION and MARY ALICE JONES,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

(a) Report of Opinions in Courts Below

The Court of original jurisdiction wrote an opinion (New York Law Journal, May 4, 1961), which is set forth at (94 to 99*) of the certified record on appeal.

Upon direct appeal to the New York Court of Appeals pursuant to Subdivision (4) Section 588 of the Civil Practice Act, of the State of New York, Chief Judge Desmond wrote an opinion sustaining constitutionality of the amended statute (10 N. Y. 2nd 263).

Said opinion is set forth in the appendix (pp. 1a-8a), and states in part:

> "Plaintiff has taken a direct appeal from the Court of first instance to this Court (Civil Practice Act,

* All numbers refer to folios of the record on appeal in the New York Court of Appeals.

588(4)) asserting the invalidity under the federal and state constitutions of three 1961 amendments (L. 1961, Ch. 337) to the Emergency Housing Rent Control Law" (appendix, p. 1a).

A copy of the order of remittitur of the New York Court of Appeals is set forth in the appendix (pp. 12a-13a) and the judgment of the Supreme Court, New York County entered upon such remittitur is printed in the appendix (pp. 14a-15a).

(b) The Jurisdiction of This Court Is Based on the Following:

(i) This action was commenced by a complaint (43-81), which sought a declaratory judgment and injunctive relief against the enforcement of three provisions of the amended Residential Rent Control Statute adopted by the 1961 Legislature of the State of New York in extending residential rent control pursuant to the provisions of Chapter 337 of the Laws of 1961 of the State of New York. The challenged amendments are in derogation of appellant's constitutional rights in the following three respects in that they: (1) deprive appellant from securing a reasonable rent and fair return on its property until it has owned such property for a minimum period of one year; (2) prohibit the effectiveness of an award in a reasonable rent or fair return proceeding prior to the date of its issuance irrespective of the time consumed in the processing of the application and irrespective whether such date of issuance is months or years subsequent to said one year probationary period; (3) apply the aforesaid provisions of the amended statute retroactively to proceedings pending on the effective date of said amended statute.

Appellees moved to dismiss the complaint (37-39) and (28-33) "solely because the Emergency Housing Rent Control Law is constitutional".

The Supreme Court, New York County granted the motions to dismiss the complaint (94-99) and judgment was entered thereon (22-27).

(ii) The final order and judgment of the New York Court of Appeals affirming the judgment of the Court of original instance holding Chapter 337 of the Laws of 1961 of the State of New York constitutional was dated and filed July 7, 1961 but not served until September 28, 1961. The notice of appeal to this Court was served and filed September 29, 1961, in the office of the Clerk of the Supreme Court, County of New York, which is the Court possessed of the record and proceedings in this cause.

(iii) Jurisdiction of the appeal to this Court is conferred by the provisions of 28 United States Code, Section 1257(2). The Court of Appeals of the State of New York is the highest Court of that State and the order and judgment of that Court affirm the constitutionality of a statute which violates the due process and equal protection of the laws provisions of the Fourteenth Amendment of the Constitution of the United States.

(iv) Cases sustaining the jurisdiction of this Court include the following:

East New York Savings Bank v. *Hahn*, 326 U. S. 320;

Pennsylvania Coal Company v. *Mahon*, 260 U. S. 393;

Paulos v. *New Hampshire*, 345 U. S. 395, 402.

(v) The challenged provisions of the amended statute are set forth in the opinion of the Court of Appeals and are printed in the appendix, p. 11a.

(c) Questions Presented by This Appeal

This appeal involves the constitutionality of the Emergency Housing Rent Control Law of the State of New York (Chapter 274, Laws of 1946, as last amended effective June 30, 1961, by Chapter 337, Laws of 1961). Appellant contends that the amended statute violates the Constitution of the United States in the following major respects:

(i) It violates the due process clause of the Fourteenth Amendment of the Constitution of the United States.

(a) Insofar as it deprives appellant of a fair return and reasonable rent on its property by prohibiting the appellee, Temporary State Housing Rent Commission, (hereinafter referred to as the Commission) from:

I—determining any reasonable rent proceeding until appellant has owned its property for one year; and

II—making any award in any such reasonable rent or fair return proceeding effective prior to the date of its issuance irrespective whether such order is issued months or even years subsequent to such one year ownership period.

(b) Insofar as it makes the provisions of the amended statute retroactively applicable to appellant's fair return and reasonable rent application, pending many months prior to the effective date of said amended statute.

(ii) It violates the equal protection of the laws clause of the Fourteenth Amendment of the Constitution of the United States insofar as it discriminates against appellant by prohibiting it for a minimum of one year from securing a return of 6% on the value of the property as reflected by either:

(a) The equalized assessed valuation of the property, while owners who purchased property prior to March 15, 1957, are entitled to a 6% return on the equalized assessed valuation as promptly as applications can be processed; or

(b) Appellant's purchase price, while owners who purchased properties between March 15, 1957 and June 30, 1960, (one year prior to the effective date of the Statute) are entitled to a 6% return on said purchase price as soon as the processing of the application can be completed.

(d) Statement of the Case

Appellant is the owner of premises 320 E. 57 St., New York, N. Y., located in the luxury Sutton Place area of the City of New York. Appellant purchased said premises on February 20, 1961, for $1,375,000 as the result of a contract executed November 19, 1960. The seller was paid all cash of $992,144.91 above the first mortgage then outstanding of $385,230.09 (50-51).

The residential rentals of the subject property like all premises in the City of New York constructed prior to February 1, 1947, have been controlled since November 1, 1943, based upon a freeze date of March 1, 1943. (See *315 West 97 St. Corp.* v. *Boules*, 156 Fed. 2nd 982, cert. den. 329 U. S. 801.)

Effective May 1, 1950, the State of New York as permitted by the then existing Federal law (the Federal Housing &

Rent Act of 1949, 50 U. S. C. A. App. 1894 Section 204J), substituted State rent control for Federal rent control. The State enactment was Chapter 274 of the Laws of 1946, as amended by Chapter 250 of the Laws of 1950 of the State of New York. Said statute prescribed directives to the Commission to provide regulations for the individual adjustment of maximum rents no later than March 15, 1951, on a generally fair and equitable basis.

In *Teeval Co., Inc.* v. *Stern*, 301 N. Y. 346, certain retroactive provisions of said statute were set aside as violative of the supremacy clause of the United States Constitution. This Court denied certiorari on the application of the defendant tenant and the State of New York, and likewise denied the cross-petition of the landlord, Teeval Co., Inc., which was purely conditional in the event certiorari was granted on the main application (340 U. S. 876).

Since March 15, 1951, the State Rent Control Statute has prescribed for a fair return on value as the constitutional compensation for continued control. From March 15, 1951 to June 30, 1957 valuation was bottomed upon the equalized assessed valuation in effect at the time of the filing of the application with discretion vested in the Commission to adopt an alternative valuation in four enumerated instances, inter alia, where there had been a bona fide sale of the property between March 15, 1951, and the time of the filing of the application (Chapter 443 Laws of 1951; Chapters 320 and 321 Laws of 1953; Chapter 685 Laws of 1955). During these years, the State rent control statutes, unlike their Federal predecessors of 1948 and 1949 (see *Wasservogel* v. *Meyerowitz*, 300 N. Y. 125) made no provision for the retroactivity of adjustment orders prior to the date of issuance, but no constitutional challenge thereto was ever made.

Attempts to require new owners of property to await a probationary moratorium before filing and securing a fair return were repeatedly rejected by the courts.

Matter of DiVarco v. *McGoldrick*, 281 App. Div. 955;
Matter of Florell v. *Weaver*, 155 N. Y. S. 2nd 222, aff'd 2 A. D. 2nd 541, unan. aff'd 2 N. Y. 2nd 982.

In *DiVarco*, the Metropolitan Life Insurance Co. had filed an application for a fair return on property it had acquired during foreclosure. During the pendency of the application, the property was sold and the Commission awarded the increase to the purchaser. Special Term set aside the order, but the Appellate Division unanimously reversed on the Administrator's appeal. Significantly, the Commission in its brief noted that a requirement forcing an owner to wait a year "would be clearly contradictory to the legislative intent that landlords should not be compelled to subsidize tenants. (Rent Control Plan, January 15, 1951, p. 18.)" How can such a subsidy be justified 10 years later?

In *Florell*, the Commission attempted by administrative regulation to adopt a one-year probationary moratorium but the courts abolished this regulation. Special Term in its opinion noted in part:

> "By the time the application is processed, the new landlord has indeed become an old owner, and by the time of decision has already served practically all his 'probation' so that there is no reasonable basis for further distinction as between new and old owners (155 N. Y. S. 2nd at 214)."

The Appellate Division which held the regulation invalid by a divided court, stated in part:

"The Commission is undertaking to hamstring itself by this regulation . . . Contrary to the statutory intent, the challenged regulation attempts to impose an arbitrary standard that would preclude both bona fide and suspect applications for adjustments . . .

"It was argued that the regulation merely postpones the owner's right to a rent adjustment. Since the adjustment cannot be retroactive prior to the date of the order, that argument is specious (citing cases). When in addition there is taken into consideration the delay occasioned by the processing of an application for a rent adjustment, the owner entitled to an increase would be prevented from receiving it, under the regulation, for a period varying from one year and four months to as long as two years." (2 A. D. 2nd at 542; 157 N. Y. S. 2nd at 171.)

The 1957 Legislature in extending the rent control statute (Chapter 755 Laws of 1957), changed the regulatory pattern as follows:

(1) It established the mandatory valuation base at the most recent bona fide sale since March 15, 1953, provided such sale price was the result of a transaction "at arms' length, on normal financing terms and unaffected by special circumstances".

(2) It provided for the retroactive effectiveness of orders of adjustment as of a date two months from the time of the filing of the application.

(3) It specifically rejected the request of the Commission to provide for a one-year probationary moratorium.

Thus, the report of the legislative study commission (The Temporary State Commission to Study Rents and Rental Conditions) stated in part:

> "The attempts to amend the law in two particulars as contained in the Bill sponsored by the Rent Administrator are calculated to circumvent two decisions of the courts. One such decision invalidated a regulation promulgated by the Administrator which had disregarded the sales price which the law required him to consider in evaluating property . . . In the other case (Matter of Florell, supra) in which a regulation of the Administrator was struck down by the court, the court said that if the regulation was permitted to stand, the Administrator would have been forced to 'hamstring' himself and would preclude bona fide and suspect applications for adjustments." (McKinneys 1957 Session Laws at 1548.)

The New York Court of Appeals had occasion to interpret the mandatory sales price provision in a number of instances. (*Matter of Ackerman* v. *Weaver*, 6 N. Y. 2nd 283; *Matter of Realty Agency Inc.* v. *Weaver*, 7 N. Y. 2nd 249.) In *Ackerman*, the New York Court of Appeals held that, "The statute contemplates that tenants will be required to pay a reasonable rent" (6 N. Y. 2nd at 287). In the *Realty Agency* appeal, the Court stated in part that the statute

> "in its present form expressly mandates the use of sales price if the sale took place after March 15, 1953, as opposed to assessed valuation, for, as the legislative commission pointed out, bona fide sales prices are 'a more accurate reflection of value in fair return applications' (New York State Leg. Annual 1957, p. 264; Matter of Ackerman v. Weaver, 6 N. Y. 2nd 283, 287)." (7 N. Y. 2nd at 252.)

With respect to the special circumstance safeguard, the New York Court of Appeals stated:

"That term (special circumstances) is not defined by statute except as it is illustrated, namely, 'such as a forced sale, exchange of property, package deal, wash sale or sale to a cooperative . . . The illustrations set forth in the statute are of situations where the price yielded a distorted reflection of value." (7 N. Y. 2nd at 254.)

On January 15, 1961, the Commission through its Administrator, Robert E. Herman, issued a report of its operations under the statute and analyzed the provisions dealing with the fair return adjustment based on recent sales prices. The report noted that there are "$1,800,000 controlled accommodations" in the City of New York, and then reported as follows (Herman Report, p. 16):

"In determining fair return cases, the Rent Control Law mandates the use of assessed valuations in some cases and sales prices in others. A total of 1,727 landlord applications involving buildings containing 13 or more apartments was submitted under the applicable Net Annual Return (53-5) Section of the Rent Regulations during the period January 1, 1958 through October 20, 1960. Of the 1,727 total, 939 cases had a sale price valuation basis and of these, 742 were granted and 197 were denied.

"Previous applications among the 742 grants based upon sales price valuation were reviewed as far back as March 15, 1951—the earliest date such an application could have been filed. This study showed that 557 had received no prior grant since March 15, 1951; 153 had received only 1 prior grant; 26 had received 2 prior grants and 6 had been awarded 3 prior grants. Thus, 185 of the 742 cases processed on a sale price

valuation during this period had received more than one grant.*

"*An analysis of the 185 sale price cases where one or more prior grants had been received showed that 84 were based upon the same purchase price used in the prior grant; 54 had the equalized assessment used as the valuation in the prior grant; and only 47 cases (40 of which had only one prior grant) had their most recent award based upon the higher purchase price than that used in a prior grant.* (Italics supplied.)

"In addition, 664 of 742 cases receiving sales price grants showed that the sales price was higher than the equalized assessed valuation, *while 76 involved a sales price which was lower than the equalized assessed valuation. In two cases, the sales price and the equalized assessed valuation were the same.*

"In 17 cases, the Commission rejected the applicant's proposed use of sales price as the valuation and used instead the equalized assessed valuation which in 11 instances was lower than the sales price." (Italics supplied.)

On February 27, 1961, a five-man committee under the chairmanship of Honorable James W. Gaynor, Commissioner of Housing, and of which the Administrator of the appellee Commission was a member, issued a report recommending the challenged amendments, all of which were ultimately adopted by the Legislature.

---

* The incongruous reference to "185 of the 742" cases which had "received more than one grant" refers to situations where there has been more than one application *on the same sale price* as the better reflection of value than assessment. The Statute Section 4.4b precludes increases of more than 15% in any one year thus forcing a property owner to file repeat applications when the earnings of the property are materially below 6%; or in the alternative where there had been one adjustment based upon an assessment and another adjustment based upon a bona fide sale price.

Said report (McKinney's 1961 Session Laws, pp. 1986-1995) quoted the foregoing excerpt of the Herman Report (McKinney's 1961 Session Laws, pp. 1987-1988) and then stated so far as here material as follows: (McKinney's 1961 Session Laws 1988-1989.)

> "An analysis of these statistics thus discloses that, for the entire twenty-two month period covered*— the period following the statutory amendment mandating the use of sales price in lieu of assessed valuation— there were 939 sales price applications, of which 742 were granted. In only 185 cases was there a prior grant, and of these cases, *only 47 of the prior grants were based on a lower sale price. Of these 47 cases, there were only 7 cases involving more than one prior grant based on sales price.*
>
> "In short, from March 15, 1951, to October 20, 1960 —almost ten years—there were just 7 applications granted in the State where there was a history of more than one prior grant based on a lower sales price than that used in the most recent application. *There is obviously little support in fact for the assertion that a widespread practice exists of repeated sales resulting in spiralling rents.* (Italics supplied.)
>
> "This is not to say, however, that other abuses and inequities have not arisen under the present statutory provision with respect to the use of a sales price valuation. *The legislative adoption of sales price rather than assessed valuation as a preferable index of current property value accords with accepted valuation principles and practice which traditionally pay heed to recent sales as, prima facie, the better test of current value.* However, the legislative intent was also

---

* The reference to a 22-month period is an obvious mechanical error because from January 1, 1958, to October 20, 1960, represents virtually 34 months and not 22 months.

to provide the Administrator with authority to curb any cycle of successive sales followed by application for adjustment . . . (See Report of New York State Temporary Commission to Study Rents and Rental Conditions, March 20, 1957, Page 23.)" (Italics supplied.)

"The Emergency Housing Rent Control Law presently prescribes the use of a sales price as the valuation of a property

"'. . . where there has been a bona fide sale of the property within the period between March 15, 1953, and the time of filing of the application, as the result of a transaction at arms' length, on normal financing terms at a readily ascertainable price and unaffected by special circumstances such as a forced sale, exchange of property, package deal, wash sale or sale to cooperative; provided, however, that where there has been more than one such bona fide sale within a period of two years prior to the date of the filing of such application the Commission may disregard the most recent of such sales only if a prior sale within such two-year period was adopted as the valuation of the property in a proceeding under this subparagraph.'

"Thus, the present statute contains various safeguards. The Act prohibits the use of a sales price where it is not the best reflection of the property's current value because the circumstances involved distort the terms of the transaction. A minimum two-year period is also imposed before the Commission is required to adopt a higher bona fide sales price where the previous bona fide sales price had been adopted in a prior application.

"It has been claimed that sales are made between persons or corporations closely related or connected,

which are in fact exchanges, deals, sweetheart transactions, or wash sales, at prices fixed so as to qualify for rent adjustments under the fair return provision of the Rent Law. Actually where such circumstances are found to exist no rent adjustments are allowed by the Commission. The statutory provisions, as previously quoted, are amply broad—and have been used by the Commission—to bar any such possible abuse.

"The statutory language requiring normal financing terms is necessarily couched in general terms in order to permit its flexible application in all cases. From 1957 to 1959, the administrative approach to these safeguards was to apply an inflexible and conclusive presumption that normal financing terms were always present whenever the cash payment equalled or exceeded 15% of the sales price, and always absent whenever the cash payment was less than 15%. After the Courts uniformly rejected this narrow concept as an improper abandonment of administrative discretion, the present administrator in 1959 assigned personnel having both real estate and legal experience to make an exhaustive analysis of property transactions where sales prices were used in applying for fair return adjustments. In order to insure the gathering of all the facts and an opportunity for both landlords and tenants to be heard, the practice of conducting a preliminary hearing was adopted, particularly in the cases of great complexity. With the cooperation of the Rent Control Committee of the Bar Association of the City of New York, a supplementary application form was prepared, the completion of which was required where a sales price was requested as the valuation base of the property. In addition, detailed objective criteria were developed, to be used in the analysis of a sales price and the determination as to whether it meets the

statutory definition. Each application is treated on its own merits in this fashion."

Subsequent to the receipt of said report, the holding of a legislative hearing and the issuance of a report by the Legislative Study Commission, the challenged amendments were enacted into law effective June 30, 1961.

In the meanwhile, and on February 27, 1961, appellant had filed its application for reasonable rent relief and on April 20, 1961, the date the statute was enacted into law by the signature of the Governor, this action for declaratory judgment was instituted. The appeal was argued in the New York Court of Appeals on June 7, 1961, before the effective date of the Act but the judgment of affirmance was rendered July 7, 1961 after the effective date of the Act. Since the Commission did not complete its action on appellant's application prior to June 30, 1961, it is prohibited from acting thereon prior to February 20, 1962, one year from the date appellant became the owner of the property.

The complaint challenged constitutionality of the amended statute on Federal as well as on State constitutional grounds (57; 70; 72; 76-79). The opinion of Special Term (94-99) is based solely on constitutional grounds and the opinion of Chief Judge Desmond of the New York Court of Appeals quoted *supra*, p. 7, asserts that the statute is challenged on Federal as well as on State constitutional grounds.

The foregoing review of the proceedings in the New York courts, particularly in the Court of Appeals, State of New York, demonstrates that this Court has jurisdiction of this cause under the provisions of 28 U. S. C., Section 1257(2), since (1) there is directly involved the legality of Chapter 337 of the Laws of 1961 of the State of

New York under the provisions of the Constitution of the United States, and (2) the highest court of the State of New York, has sustained the constitutionality of that legislation.

(e) The Federal Questions Are Substantial

(1) There are no disputed issues of fact upon which the ultimate determination of constitutionality of the amended statute depends. The statute by its terms prohibits appellant from securing a reasonable rent for its property until a minimum of one year since appellant's purchase namely until February 20, 1962, when residential rent control in New York will be nineteen years old.

In *Bowles* v. *Willingham*, 321 U. S. 503, this Court sustained constitutionality of the wartime Federal statute with the observation that the Administrator was mandated to establish maximum rents on a generally fair and equitable basis accompanied by a directive to provide for adjustment of such maximum rents to reflect increased property taxes and other operating costs.

If either the wartime statute or the State Act had made no provision whatsoever for any property owner to secure adjustment of maximum rents on a generally fair and equitable basis, immediately, and not a year later, both laws would be clearly incompatible with the *Willingham* case.

While the statute under review makes provision for a fair return premised on either equalized assessed valuation or sale price depending upon the date of purchase, for all property owners after one year of ownership, appellant submits that complete deprivation of a reasonable rent for one full year constitutes confiscation of property *after eighteen years of residential rent control.*

The New York Court of Appeals bottomed its approval of this one year probationary moratorium on two basic grounds.

Firstly, the learned Chief Judge stated in part as follows (appendix, pp. 4a-5a):

> "Appellant does not dispute the continuance of the housing emergency which is the predicate for these housing rent control laws. It cannot deny that prohibitions against rent increases may in an emergency be constitutional although they reduce the value of the property regulated and deprive its owner of what otherwise would be considered a fair return (see *Bowles* v. *Willingham*, 321 U. S. 503; *Teeval Co.* v. *Stern*, 301 N. Y. 346, 362, certiorari denied 340 U. S. 876)."

It is respectfully submitted that the New York Court of Appeals has misconceived this Court's actions in the two cited cases. In *Willingham*, this Court dealt with a Federal statute enacted pursuant to the war power at the height of the shooting war, which even then placed no arbitrary moratorium against the establishment of a generally fair and equitable rent with immediate adjustment to reflect increased property taxes and other operating costs. This is a far cry from a statute adopted eighteen years later in the only State which still saddles the property owner with rent control. Only too true were the prophetic words of the late Mr. Justice Jackson in *Woods* v. *Miller*, 338 U. S. 138

> "I cannot accept the argument that war powers last as long as the effect and consequences of war, for if so they are permanent—as permanent as the war debts."

In *Teeval*, this Court did not pass upon the constitutional propriety of depriving a landlord of a fair return. Upon the landlord's conditional cross-application for certiorari, denial became automatic once the main petition of the State of New York had been rejected.

In foreclosing a property owner eighteen years after the start of rent control from a fair return for a full year, the learned Chief Judge likewise misconceived appellant's contentions. There can be no question that the very operation of the police power in applying rent controls automatically reduces the value of property. Thus, the subject property sold for $1,375,000 would no doubt sell for two million dollars if freed from control. Once, however, the value of property is automatically reduced by the mere existence of controls, appellant respectfully submits that it has a constitutional right to a fair return and reasonable rent on that reduced controlled value. Under such circumstances, deprivation of a fair return for a probationary moratorium even when such reasonable rent is calculated only upon the reduced value reflected by the controls, means that the statute goes too far.

Block v. *Hirsch*, 256 U. S. 135.

In sum, appellant submits that while its constitutional right to a specified return may be admeasured to a market value reflective of the controlled status of its property, it is constitutionally entitled immediately to a full return on the controlled value, namely the price at which controlled property is bought on the open market in an arms' length transaction.

The statutory scheme contemplates the fixation of a reasonable rent (see *Matter of Ackerman* v. *Weaver*, *supra*) at the expiration of the one year moratorium. We respectfully submit that if appellant has a constitutional right to

such a return at the end of the year, there is no constitutional justification for the deferment of that right for the one year period. As the late Mr. Justice Cardozo held while a member of the N. Y. Court of Appeals in *Municipal Gas Co.* v. *Public Service Commission*, 225 N. Y. 89, 95-96:

> "But the argument is that the statute is either valid or invalid at the moment of its making, and from that premise the conclusion is supposed to follow that there is a remedy for present confiscation but none for confiscation that results from changed conditions . . . The prediction must square with the facts, or be cast aside as worthless (Ex parte Young, 209 U. S. 123, 147, 148). It must square with them in one year as in another, at the beginning but equally at the end. . . .
>
> "In every statute of this kind we are to read, therefore, the implied condition. The condition is that the rates shall remain in force at such times only as their enforcement will not work denial of the right to a fair return. When the return falls below that level, the regulation is suspended.
>
> "It will seldom be important that rates have been inadequate for a day, for a week or a month. Fleeting losses may be suffered and yet the balance sheet may show a profit. Prolong the loss, however, for a year and you may reach across the danger line. It is by the average of the year that business commonly reckons its losses and its gains."

Appellant respectfully submits that this aspect of constitutional rights represents a matter of first impression which warrants a review by this Court as a substantial question.

The second basis upon which Chief Judge Desmond premised the validity of the statute was stated as follows:

"There is, of course, not only an exceedingly strong presumption of constitutionality (*Defiance Milk Products Co.* v. *DuMond*, 309 N. Y. 537, 540) but a further presumption that the Legislature has investigated for and found facts necessary to support the legislation (*Lincoln Bldg. Associates* v. *Barr*, 1 N. Y. 2d 413; *East New York Sav. Bank* v. *Hahn*, 293 N. Y. 622, affd. 326 U. S. 230). But, besides those generalities, we have a showing that the Legislature had before it when it legislated on this subject in 1961 three different reports all made in 1961 and the minutes of a public hearing held in Albany in March of that year by the Temporary Commission (see McKinney's 1961 Legislative Annual, pp. 886-909).

"Appellant says that these reports (the so-called Herman report made to the Governor by the State Rent Administrator and the report of the Governor's five-man or 'Gaynor' committee) show that there had not been any widespread practice whereby rent increases were resulting from a series of successive sales at inflated prices with each resale used as a new base for rent calculation. *It is true that the Herman report shows, in nine years, only a few such cases and no 'widespread practice' of applications granted where there had been a prior grant on a lower sales price.* However, the five-man Committee's report points out that it is the legislative purpose to provide the Administrator with authority to curb any such cycle. The Committee recommended, therefore, the one-year delay and no-retroactivity safeguards. A month later (March 23, 1961) the Temporary Commission, a different body, reported to the Legislature as required by law (see L. 1948, ch. 675). In its report it described public hearings held earlier that month in Albany at which much testimony had been taken. It adopted some of the

five-man Committee's suggestions, including those with which we are concerned and which the Rent Administrator specifically urged at the hearing. Other speakers told of the 'alarming rate' at which apartment buildings were changing ownership at spiraled prices. The Mayor of New York City informed the Temporary Commission that 'it is increasingly the practice to sell rent-controlled real estate at inflated prices which bear little relation to the existing rent rolls or market value' and pointed out that under the then law there was nothing to prevent an increase based on that inflated price and than another sale two years later with a similar rent increase. A representative of a tenants' association showed the Committee newspaper advertisements indicating that sellers and buyers were taking advantage of this opportunity. All this shows a reasonable basis for legislative action to slow up the process—not so much to deprive owners of sales opportunities or buyers of adequate rents as to remove or prevent conditions creating inflationary spirals of prices and rents. The 'actual and manifest evil' which serves as a predicate for police power law-making can consist of a well-founded fear of future trouble. Purchases of rental property at high prices predicated on immediate rent rises could defeat the proper purposes of residential rent control. Thus, the writing of these precautions into the law was, as the Legislature saw it, reasonably necessary for the public welfare. Even if there were no record of any investigation, factual support for the legislation would be assumed by the courts to exist. And so appellant would have a heavy burden as to disputing the Legislature's fact findings made after Committee hearings and reports. Surely this record does not conclusively destroy those findings and any dispute as to underlying facts could not be presented on this

direct appeal which brings up constitutional questions only (Civ. Prac. Act, sec. 588, subd. 4)."

Appellant respectfully submits that this premise raises two substantial questions warranting Supreme Court review as follows:

(a) Can there be any rational basis to a police power enactment which is interpreted by the New York Court of Appeals as an attempt to "prevent conditions creating inflationary spirals of prices and rents" when the basic report upon which the legislation is founded admitted that:

"there is obviously little support in fact for the assertion that a widespread practice exists of repeated sales resulting in spiralling rents?" (McKinney's 1961 Session Laws *supra* at 1988)

Placing this question in its market place perspective, we ask:

"How can there be an inflationary price for a controlled commodity?"

Insofar as the learned Chief Judge has foreclosed appellant by the observation that:

"Any dispute as to underlying facts could not be presented on this direct appeal which brings up constitutional questions only"

we submit that the judgment under review stems from an order on appellee's motions dismissing the complaint in the nature of a demurrer for failure to set forth facts sufficient to constitute a cause of action. Under such circumstances, we further submit that appellant, even in the appellate courts and including this court, is entitled to a

review of the complaint from a construction most favorable to the charge of unconstitutionality.

Assuming a sales transaction meets the exacting statutory safeguards, in that it is the result of arms' length bargaining, on normal financing terms and unaffected by special circumstances, how can the price be either "high" or "inflated"?

If the charge of a "high" price is equated to 1943, the basic rent freeze date, we submit consideration would have to be given to the shrinkage in the dollar over the eighteen-year interval. On this record there is a complete absence of any such consideration. The New York Court of Appeals itself pointed out in *Matter of Realty Agency, Inc. v. Weaver*, 7 N. Y. 2d at p. 254, that even the prior statute had ruled out "situations where the price yielded a distorted reflection of value". We submit that once the statute blocks off price distortion from the bargaining process, there is no rational basis for legislation addressed at imaginary spirals of controlled rentals.

So long as rents are controlled while all items the property owner must buy to operate his real estate are free from control, it is irrational for the Legislature to adopt added restrictive amendments for the prevention of potential but concededly non-existent spirals.

(b) The asserted statutory objective as interpreted by the Chief Judge was to prevent

> "purchases of rental property at high prices predicated on immediate rent rises—based on that inflated price and then another sale two years later with a similar rent increase"

Even if the foregoing were to constitute a rational basis for legislative action—a proposition which appellant has

challenged in subdivision (a) of this question *supra*—this provides no justification for depriving appellant for the entire year of at least a return based on the equalized assessed valuation of the property of $910,000. This alternative valuation base clearly has no relevancy to alleged purchases of rental properties at so-called inflated prices predicated on "immediate rent rises." Yet, the statute in establishing the one-year moratorium precludes any fixation of a reasonable rent for the one year period irrespective whether appellant seeks the return on his purchase price or the lower equalized assessed valuation. Counsel for appellee recently interpreted this aspect of the statute. (The full text of the interpretation is reproduced in the Appendix, pp. 16a-18a.)

The pertinent provision of said interpretation quoted appellant's factual inquiry as follows:

> "The record shows that this property was purchased February 20, 1961, at a price of $1,378,000. The equalized assessed value of the property is $909,000. While the application as originally filed at a date prior to the effectiveness of the 1961 amendment, requested a 6% return on the aforesaid purchase price, the mathematics demonstrate that the property is not earning a 6% return on the aforesaid equalized assessed value.
>
> "The 1961 statute as sustained by the Court of Appeals prohibits the issuance of an order of rent adjustment earlier than February 20, 1962, or one year from the date of purchase in that the statute prescribes that 'No adjustment ordered by the Commission based upon such sales price valuation shall be effective prior to one year from the date of such sale.
>
> "It is my understanding that you interpret the statute as likewise prohibiting the issuance of such an order for this property prior to February 20, 1962, even if

the landlord requests the alternative reduced value represented by the equalized assessment. Would you kindly at your earliest convenience advise me (a) as to your interpretation concerning the foregoing question, (b) the basis for your interpretation. This letter is sent to you not necessarily because we disagree with your interpretation but merely to have the answer and reasoning for the record."

Appellee's counsel replied thereto as follows:

"Prior to the 1957 extension of the Rent Law, the Commission had the authority to adopt as the valuation base in a fair return proceeding either the equalized assessed valuation of a property or its latest bona fide sales price since March 15, 1953. The 1957 amendment to the Law eliminated that discretion and mandated the valuation base to be the latest sales price since March 15, 1953. Only in the absence of a bona fide sale since March 15, 1953, was the equalized assessed valuation to be used. These provisions were unchanged in the 1959 amendment and modified in the 1961 extension of the Law only to the extent that the use of bona fide sales was confined to those occurring on and after March 15, 1957.

"Nowhere has the Legislature ever indicated that the discretionary authority taken from the Commission since the 1957 amendment to the Law has been or should be transferred to landlords or others. On the contrary, where a bona fide sale of the property has occurred since March 15, 1957, unaffected by special circumstances which distort the sales price, it was legislatively determined that such sales price be the sole valuation base in fair return cases."

Appellant respectfully submits that the foregoing interpretation constitutes a frank concession that for a minimum one-year period a property owner is required to subsidize tenants at a rental concededly lower than a reasonable rent. This court has never approved or even considered the constitutional validity of such an arbitrary fiat which for at least one year transfers property from one citizen (a property owner) to another citizen (a tenant) without the slightest pretext for compensation. No rational basis related to the health, safety and welfare of the citizens of the State and City of New York has been advanced to justify such confiscatory action.

Price and rent controls were adopted as a matter of national wartime policy and were sustained as such by this Court (see *Bowles* v. *Willingham*, *supra*). The national policy has, however, rejected continuation of such controls in the absence of the shooting war. New York remains the only one of the 50 states continuing such controls. Under such circumstances, no warrant exists as a matter of constitutional right for depriving a New York property owner like appellant from a reasonable rent for one full year.

(2) As an adjunct to the one-year probationary moratorium, the amended statute precludes the effectiveness of an order of rent adjustment prior to the date of its issuance. Accordingly, if the processing on appellant's application is not completed by appellee prior to February 20, 1960, and orders are not issued until for example May 1, 1962, they cannot be made effective prior to such latter date of issuance even though said one-year moratorium period is passed. This merely accentuates the deprivation of property rights resulting from the amended statute. The foregoing, of course, becomes crucial in the light of the recognition by the Appellate Division of the New York Supreme

Court referred to *supra*, p. 8, in *Matter of Florell*, as to the extreme delay involved in proceedings of this type.

Concededly, appellant has not yet been damaged by this aspect of the statute. Concededly, also, appellant by virtue of filing the application prior to the statutory effective date has not been required to wait a six-month preliminary probationary period as a condition precedent to filing. Property owners who purchase properties subsequent to June 30, 1961, are, however, required to undergo such a six months condition precedent. In this case, the slow pace of Commission processing for a fair return makes completion of the application within a six months period at the very least doubtful, so that at the inception of the one-year moratorium such a property owner continues to be deprived of a reasonable rent and fair return from his tenant solely by the operation of the amended statute. Accordingly, as to such owners, the prohibition against effectuation of an order prior to its issuance threatens even greater constitutional property deprivation than to appellant. It is respectfully requested that in order to avoid multiplicity of litigation and the hardening of equities in the case of such other property owners and further to avoid the need for embarking upon a further appeal by a different owner, this Court is respectfully requested to consider the constitutional infringements of the denial of retroactivity resulting from the amended statute even though the threat to appellant may not be as severe as in the case of other property owners.

Symptomatic of the obliteration of such property owner's rights is an executive order issued by the Governor on October 29, 1961, freezing the determination of all applications based on equalized assessed valuation. (See N. Y. Times, October 30, 1961, p. 1.) Based upon said statement of the Governor, the State Rent Administrator (the Administrator of the appellee Commission) on October 30, 1961,

issued Operational Bulletin #44, reprinted in the Appendix, page 19a. Said administrative order provides for a review of all pending fair return applications and directs that:

> "Pending completion of the review, no final action on fair return applications (Sec. 33(5)) may be taken."

There is no time limit on the period for this review and accompanying stay. Unless such abatement of final action is lifted by February 20, 1961, appellant's property is further confiscated because the order, when, as and if ever issued, is not retroactive even to said one-year anniversary.

The property at 175 E. 79 St., *Rent Commission* case number AO-100708, purchased November 1, 1960, one of the first affected by the one-year rule, did not receive its orders on November 1, 1961, solely because of the foregoing delays. Denial of retroactivity under such circumstances constitutes complete confiscation.

The New York Court of Appeals gave no specific consideration to this aspect of appellant's challenge except within its general approbation of the statutory objective to "slow up the process." Such an objective which is within the purview of the one-year rule moratorium constitutes no justification for denying the constitutional right to a reasonable rent until the arduous processing period has been completed.

As Mr. Justice Oliver Wendell Holmes of this Court stated many years ago in *U. S.* v. *New York Central Railroad*, 279 U. S. 73:

> "Naturally to save its constitutionality (referring to the statute) there is coupled with the requirement to transport a provision that the railroads shall receive a reasonable compensation . . .

"The Government admits, as it must, that reasonable compensation for such required services is a constitutional right . . .

"If the claim of the railroad is just they should be paid from the moment when the application is filed. In the often quoted words of Chief Justice Shaw, 'If a pie-powder court could be called on the instant and on the spot the true rule of justice for the public would be, to pay the compensation with one hand, while they apply the axe with the other' . . . In fact the necessary investigation takes a long time, in these cases, years; *but reasonable compensation for the years thus occupied is a constitutional right of the companies no less than it is for the future . . . unless the Commission has the power assumed a part of the railroad's constitutional rights will be left in the air.*" (Italics supplied.)

No rational basis and no justification has been advanced for bypassing Mr. Justice Holmes' guiding precept. It is respectfully submitted that such departure from this Court's constitutional delimitation alone makes this an issue warranting review by this Court.

(3) The retrospective application of the amended statute to proceedings such as appellant's instituted before appellee many months prior to the effective date of the statute appears to have no federal constitutional precedent. The New York Court of Appeals relied solely on State authorities and held on this point as follows (appendix, p. 7a):

"There remains appellant's assertion that its constitutional rights were infringed when the 1961 statute was made to apply in this respect to premises purchased at an earlier date. But appellant did not have in any particular rule an interest so vested as to en

title it to keep the rule unchanged (Preston Co. v. Funkhouser, 261 N. Y. 140, Wasservogel v. Meyerowitz, 300 N. Y. 125, supra). In such situations the applicability and validity of statutes are determined as of the date we make our decision (Fruhling v. Amalgamated Housing Corp., 9 N. Y. 2d 541; Matter of Tartaglia v. McLaughlin, 297 N. Y. 419; Matter of Boardwalk & Seashore Corp. v. Murdock, 286 N. Y. 494)."

There is no record that any of the cited appeals have ever been reviewed by this Court.

The only rent control authority cited by the New York Court of Appeals for the foregoing holding is the *Wasservogel* appeal. This, however, actually implied a landlord's inherent constitutional right under these very circumstances. In *Wasservogel,* a tenant had challenged the imposition of retroactivity by the operation of the federal rent regulation. Judge Desmond, then an Associate Member of the Court, rejected the tenants' challenge in the following statement:

> "It may be that as to a landlord forced to keep a tenant, due process requires that he have court review of any claim he may make that a reduction of rent or refusal to allow an increase is confiscatory. See Yakus v. U. S., 321 U. S. 414, 431. *But no property or vested right of the statutory tenant is taken when his rent is raised*" (300 N. Y. 132). (Italics supplied.)

The only comparable situation to the one at bar arose in the so-called portal-to-portal pay cases (29 U. S. C. A. Section 251; *Anderson* v. *Mt. Clements Pottery Co.,* 328 U. S. 680). There, however, a specific Congressional Declaration of emergency was enunciated founded on the proposition that the retroactive payment of portal-to-portal pay

would bankrupt the companies involved. There is not even a scintilla of rational basis for such a finding here, and in fact there is no such emergency finding. The absence of a rational basis for this retrospective operation of the police power requires its elimination as a transparent violation of basic constitutional safeguards (see *Matter of Diamond* v. *State Rent Commission*, 198 N. Y. S. 2d 735).

We respectfully submit that the retrospective operation of the amended statute constitutes an irrational breach of appellant's constitutional rights. In sum, it is respectfully submitted that the judgment below should be reversed because the challenged provisions of the amended statute violate appellant's constitutional rights. It is further submitted that at the very least on this record a plenary consideration at this time of the constitutional issues involved herein should be allowed by this Court because the questions are substantial, of first impression in this Court and the validity of the challenged provisions is at the very best highly doubtful.

Respectfully submitted,

ROBERT S. FOUGNER
Counsel for Appellant

McLAUGHLIN & FOUGNER
ALBERT W. FRIBOURG
Of Counsel

APPENDIX

EXHIBIT 1

Opinion of Court of Appeals

COURT OF APPEALS, Clerk's Office,
Albany, July 7, 1961.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk

I. L. F. Y. Co.,

Appellant,

—v.—

TEMPORARY STATE HOUSING RENT COMMISSION *et al.*,

Respondents.

Decided July 7, 1961.

Chief Judge DESMOND:

Plaintiff has taken a direct appeal from the court of first instance to this court (Civ. Prac. Act, § 588, subd. 4) asserting the invalidity under the Federal and State Constitutions of 1961 amendments (L. 1961, ch. 337) to the Emergency Housing Rent Control Law. While extending the control law (first enacted in 1946) to 1963, the Legislature modified the existing provisions which set up procedures whereby landlords may obtain maximum rent adjustments based on recent sale prices by providing that:

"No application for adjustment of maximum rent valuation based upon a sale price valuation shall be filed by the landlord under this subparagraph prior to six months from the date of such sale of the property. In addition, no adjustment ordered by the commission based upon such sales price valuation shall be effective prior to one year from the date of such sale." (Emergency Housing Rent Control Law, § 4, subd. 4, par. [a], subpar. [1], cl. [v].)

As revised in 1961, the law forbade retroactive changes in rent (§ 4, subd. 4, par. [a], subpar. [6]). The 1961 amendments were applicable to pending proceedings (§ 13).

On November 19, 1960 plaintiff-appellant contracted to purchase for $1,378,000 a rent-controlled apartment house in Manhattan. Title passed on February 20, 1961 and a week later appellant filed with the Rent Commission an application under subdivision 5 of section 33 of the State Rent and Eviction Regulations for the fixation of a reasonable rent computed as 6% return on valuation of $1,378,000 as shown by the sale price. On April 6, 1961 (this suit was commenced a few days later) and before commission action on the application was completed, the 1961 amendments were enacted. Plaintiff sues for a declaration that they are unconstitutional as to it in that an increase based on purchase price of this property cannot be obtained until at least one year from the purchase date and that any such increase will be prospective only even though by the law as it existed when plaintiff bought the building such increases were retroactive to the date of the filing of the application but for not more than six months (see L. 1957, ch. 755; L. 1959, ch. 695).

Some history should be recalled. During part of the time (up to 1948) when residential rent control was governed by Federal statutes, retroactive increases were not permitted (see *Wasservogel* v. *Meyerowitz*, 300 N. Y. 125). In 1950

the State took over and from 1950 to 1951 there was a temporary freeze of New York City rents pending submission of a new State plan (see L. 1950, ch. 250). The 1951 State act (see chapter 443 of that year) provided for nonretroactive fixation of maximum rents at rates to produce a minimum return on property value but defined value generally as equivalent to the equalized tax assessment. Discretion, however, was by the 1951 law given to the State Administrator to adopt a valuation other than the adjusted assessment in cases where there had been a sale of the property during the year next preceding March 15, 1951 (see, as to discretion, *Matter of Realty Agency* v. *Weaver*, 7 N. Y. 2d 249, 252). The 1953 statute (see chapters 320 and 321 of that year) extended residential rent control to 1955 but broadened the Administrator's powers so that he might use sale price as value where there had been a bona fide sale between March 15, 1951 and the date of the application. These increases, however, were not to be retroactive. While the 1953 statute was in effect, the administrative practice (confirmed by court decisions; see, for instance, *Matter of Wile* v. *McGoldrick*, 286 App. Div. 826, motion for leave to appeal denied 309 N. Y. 1033) was to use the purchase price as a base unless special circumstances had affected the price.

Appellant stresses the fact that the courts (see *Matter of 340 East 57th St. Corp.* v. *Weaver*, 2 N. Y. 2d 799, and *Matter of Florell Equities* v. *Weaver*, 2 N. Y. 2d 982) held entirely invalid a commission regulation adopted while the 1955 statute (identical with the 1953 act) was in effect and which prohibited the use of a sale price as the valuation base in any instance where the property had been awarded an increase in the past, and which further prohibited the filing of an application for such an adjustment until the applicant

had been owner for a year. That regulation was, however, stricken not for unconstitutionality but because it was unauthorized by statute and contrary to any ascertainable legislative intent, and so was a usurpation by the commission of legislative power.

In 1957 for the first time the Legislature dealt with "resale prices" and the fact or danger of spiraling prices on successive sales. While the use of a bona fide sales price was made mandatory instead of discretionary, the new act (L. 1957, ch. 755) gave the Rent Administrator discretion where there had been more than one sale within two years prior to the application to "disregard the most recent of sales only if a prior sale within such two-year period was adopted as the valuation of the property" in a rent-increase proceeding. The legislative authorization to use not more than one sale in each two-year period was made in response to a recommendation by the Temporary Commission to Study Rents and Rental Conditions which had reported that the Administrator needed "authority to curb any cycle of successive sales followed by applications for adjustments" (see report, N. Y. Legis. Doc., 1957, No. 22, p. 23).

Turning now to the disputed 1961 additions, we first examine into the validity of the one-year delay and no-retroactivity rules. If these are found not to be intrinsically invalid, we must move to an inquiry as to whether they may constitutionally be made applicable to a sale arranged or consummated before the effective date of the 1961 amendments.

Appellant does not dispute the continuance of the housing emergency which is the predicate for these housing rent control laws. It cannot deny that prohibitions against rent increases may in an emergency be constitutional al-

though they reduce the value of the property regulated and deprive its owner of what otherwise would be considered a fair return (see *Bowles* v. *Willingham*, 321 U. S. 503, 517; *Terral Co.* v. *Stern*, 301 N. Y. 346, 362, cert. den. 340 U. S. 876). Appellant does suggest that the 1961 Legislature acted illegally when it added new "police power restraints" to the earlier controls without any new finding as to "intensification of emergency" warranting the increased restrictions. We know of no requirement for such a new declaration or description of conditions requiring tightening of controls. The real question on this branch of the case is whether there was anything before the Legislature justifying the year-delay and nonretroactivity clauses added in 1961.

There is, of course, not only an exceedingly strong presumption of constitutionality (*Defiance Milk Prods. Co.* v. *Du Mond*, 309 N. Y. 537, 540) but a further presumption that the Legislature has investigated for and found facts necessary to support the legislation (*Lincoln Bldg. Associates* v. *Barr*, 1 N. Y. 2d 413; *East New York Sav. Bank* v. *Hahn*, 293 N. Y. 622, affd. 326 U. S. 230). But, besides those generalities, we have a showing that the Legislature had before it when it legislated on this subject in 1961 three different reports all made in 1961 and the minutes of a public hearing held in Albany in March of that year by the Temporary Commission (see "Survey Report on the Rental and Housing Market" of the Temporary State Housing Rent Commission, Jan., 1961; Report of Governor's Special Committee, Feb. 24, 1961; 1961 Report of the Temporary Commission to Study Rents and Rental Conditions, March 23, 1961 [N. Y. Legis. Doc., 1961, No. 23]).

Appellant says that these reports (the so-called Herman report made to the Governor by the State Rent Administra-

tor and the report of the Governor's five-man or "Gaynor" committee) show that there had not been any widespread practice whereby rent increases were resulting from a series of successive sales at inflated prices with each resale used as a new base for rent calculation. It is true that the Herman report shows, in nine years, only a few such cases and no "widespread practice" of applications granted where there had been a prior grant on a lower sales price. However, the five-man committee's report points out that it is the legislative purpose to provide the Administrator with authority to curb any such cycle. The committee recommended, therefore, the one year delay and no-retroactivity safeguards. A month later (March 23, 1961) the Temporary Commission, a different body, reported to the Legislature as required by law (see L. 1948, ch. 675). In its report (N. Y. Legis. Doc., 1961, No. 23) it described public hearings held earlier that month in Albany at which much testimony had been taken. It adopted some of the five-man committee's suggestions, including those with which we are concerned and which the Rent Administrator specifically urged at the hearing. Other speakers told of the "alarming rate" at which apartment buildings were changing ownership at spiraled prices. The Mayor of New York City informed the Temporary Commission that "it is increasingly the practice to sell rent-controlled real estate at inflated prices which bear little relation to the existing rent rolls or market value" and pointed out that under the then law there was nothing to prevent an increase based on that inflated price and then another sale two years later with a similar rent increase. A representative of a tenants' association showed the committee newspaper advertisements indicating that sellers and buyers were taking advantage of this opportunity. All this shows a reasonable basis for

legislative action to slow up the process—not so much to deprive owners of sales opportunities or buyers of adequate rents as to remove or prevent conditions creating inflationary spirals of prices and rents. The "actual and manifest evil" which serves as a predicate for police power law-making can consist of a well-founded fear of future trouble. Purchases of rental property at high prices predicated on immediate rent rises could defeat the proper purposes of residential rent control. Thus, the writing of these precautions into the law was, as the Legislature saw it, reasonably necessary for the public welfare. Even if there were no record of any investigation, factual support for the legislation would be assumed by the courts to exist. And so appellant would have a heavy burden as to disputing the Legislature's fact findings made after committee hearings and reports. Surely this record does not conclusively destroy those findings and any dispute as to underlying facts could not be presented on this direct appeal which brings up constitutional questions only (Civ. Prac. Act, § 588, subd. 4).

There remains appellant's assertion that its constitutional rights were infringed when the 1961 statute was made to apply in this respect to premises purchased at an earlier date. But appellant did not have in any particular rule an interest so vested as to entitle it to keep the rule unchanged (*Preston Co.* v. *Funkhouser*, 261 N. Y. 140; *Wasservogel* v. *Meyerowitz*, 300 N. Y. 125, *supra*). In such situations the applicability and validity of statutes are determined as of the date we make our decision (*Fruhling* v. *Amalgamated Housing Corp.*, 9 N. Y. 2d 541; *Matter of Tartaglia* v. *McLaughlin*, 297 N. Y. 419; *Matter of Boardwalk & Seashore Corp.* v. *Murdock*, 286 N. Y. 494).

The judgment should be affirmed, with costs.

Judges Dye, Fuld, Froessel, Van Voorhis, Burke and Foster concur.

Judgment affirmed.

EXHIBIT 2

The Opinion at Special Term of Judge Greenberg

I. L. F. Y. Co. v. Temporary State Housing Rent Commission—Defendant, the Temporary State Housing Rent Commission, and, by separate motion, the co-defendant move for dismissal of the complaint pursuant to Rule 106 (4). The Emergency Housing Rent Control Law (Chapter 274 of the Laws of 1946, as amended) was further amended (Chapter 755 of the Laws of 1957, as amended by Chapter 695 of the Laws of 1959) and provided for mandatory individual adjustment of maximum rent where the rental income yields a net annual return of less than 6 per cent. per annum of the valuation of the property based upon a bona fide sale of the property within a stated period as defined. Complaint is made of still further amendment by action of the 1961 Legislature (Chapter 337 of the Laws of 1961) in extending the Act to June 30, 1963. By such amendment, it is provided that "No application for adjustment of maximum rent based upon a sales price valuation shall be filed by the landlord under this sub-paragraph prior to six months from the date of such sale of the property," and further that "In addition, no adjustment ordered by the commission based upon such sales price valuation shall be effective prior to one year from the date of such sale." In three causes of action, plaintiff urges unconstitutionality in that it cannot obtain an increase based on the purchase price until one year from the date of its purchase, that orders of adjustment when issued are prospective only, and the amended statute applies to applications retrospectively. Claim of unconstitutionality is based upon the contention that the Legislature failed to set forth additional findings of emergency necessitating intervention of the police power

warranting such amendments and they are therefore without support. In Teeval Co., Inc., v. Stern (301 N. Y. 346 [1950 certiorari denied 340 U. S. 876]) the court stated: "In the view of the plaintiff landlord, the State rent control statute will deprive it of a 'fair return' on its investment. If that point can be considered at all on this direct appeal (see Lapchak v. Baker, 298 N. Y. 89, 80 N. E. 2d 751, supra), the answer is plain. The state rent control statute was enacted to meet a passing emergency. It does not contemplate a taking of the property of any landlord. Even though it may, now and then, compel an owner to operate his real property at a loss, the statute is not for that reason to be condemned as an arbitrary use of the police power (Bowles v. Willingham, 321 U. S. 503, 516-519, 64 S. Ct. 641, 88 L. Ed. 892)." No challenge is raised to the continuing emergency warranting police power intervention, but rather the challenge is directed to the failure to made additional legislative findings as to the particular amendment. The power to legislate with respect to the emergency is not spent merely because the Legislature has once before mandated upon the particular subject. The motion is granted and the complaint is dismissed.

I. L. F. Y. Co. v. Temporary State Housing Rent Comm'n —Defendant Meehan moves for dismissal of the complaint pursuant to Rule 106(4). The motion is granted and the complaint is dismissed. See disposition of companion motion published simultaneously herewith.

EXHIBIT 3

Challenged Provisions of the Statute

Pertinent provisions of the Emergency Housing Rent Control Law of the State of New York, as amended (Chapter 337, Laws of 1961)

Subdivision 4(a)(1) of Section 4 of the Emergency Housing Rent Control Law as amended on April 29, 1961, provides:

> "No application for adjustment of maximum rent based upon sales price valuation shall be filed by the landlord under this sub-paragraph prior to six months from the date of such sale of the property."

Said subdivision further provides that:

> "In addition no adjustment ordered by the commission based upon such sales price valuation shall be effective prior to one year from the date of such sale."

Subdivision 4.6 of Section 4 of the amended statute provides as follows:

> "No increase or decrease in maximum rent shall be effective prior to the date on which the order therefor is issued."

Section 13 of the statute and of the amended statute provides in part as follows:

> "Pending proceedings. The commission may provide for and authorize the continued processing of any application or proceeding pending at the time this act becomes effective; provided, however, that final determination of the commission in such pending application or proceeding shall not be inconsistent with this act."

EXHIBIT 4

Order of Remittitur

COURT OF APPEALS

STATE OF NEW YORK, *ss.*:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of July in the year of our Lord one thousand nine hundred and sixty-one, before the Judges of said Court.

WITNESS,

The HON. CHARLES S. DESMOND,
Chief Judge, Presiding.

RAYMOND J. CANNON, *Clerk.*

Remittitur, July 7, 1961

No. 183

I. L. F. Y. Co.,

Appellant,

—against—

THE TEMPORARY STATE HOUSING RENT COMMISSION & ANO.,

Respondents.

BE IT REMEMBERED, That on the 13th day of May in the year of our Lord one thousand nine hundred and sixty-one, I. L. F. Y. Co., the appellant—in this cause, came here unto the Court of Appeals, by McLaughlin & Fougner, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Supreme Court,

Order of Remittitur

New York County, and the Temporary State Housing Rent Commission & ano., the respondents in said cause, afterwards appeared in said Court of Appeals by Harold Zucker, & ano., their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Robert S. Fougner, of counsel for the appellant, and by Mr. Harold Zucker, of counsel for the respondent Commission, no appearance for the respondent Jones, and argued by Mathias L. Spiegel, of counsel for the Attorney General pursuant to Section 71 of the Executive Law, and after due deliberation had thereon, did order and adjudge that the judgment appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Raymond J. Cannon
Clerk of the Court of Appeals
of the State of New York

EXHIBIT 5

Order on Remittitur

At a Special Term, Part II of the Supreme Court of New York County, held at the County Courthouse, Pearl & Centre Streets, in the Borough of Manhattan, City of New York, on the 28 day of September, 1961.

Present:

HON. SAUL S. STREIT

Justice.

I. L. F. Y. Co.,

Plaintiff-Appellant,

—against—

THE TEMPORARY STATE HOUSING RENT COMMISSION and MARY ALICE JONES,

Defendants-Respondents.

Plaintiff-appellant, having appealed to the Court of Appeals from a Judgment of the Supreme Court, New York County, entered on May 5, 1961; and said appeal having been duly heard by the Court of Appeals, and that Court, in an order dated July 7, 1961 and entered in the Office of the Clerk of the Court of Appeals on July 7, 1961, having ordered that the judgment appealed from be affirmed, with costs.

Order on Remittitur

Now, upon reading and filing a certified copy of the Order of the Court of Appeals and on motion of Harold Zucker, Counsel to the State Rent Commission (Edward V. Alfieri, Deputy Counsel of Counsel) it is

ORDERED, that the Order of the Court of Appeals be, and the same hereby is made the Order of this Court.

ENTER:

S. S. S.

EXHIBIT 6

Interpretative Letter of the Temporary State Housing Rent Commission (Appellee)

(Emblem)

STATE OF NEW YORK
TEMPORARY STATE HOUSING
RENT COMMISSION
280 BROADWAY
NEW YORK 7, NEW YORK

Telephone: BArclay 7-1616

HAROLD ZUCKER
COUNSEL AND
DEPUTY ADMINISTRATOR

October 23, 1961

Robert S. Fougner, Esq.
c/o McLaughlin & Fougner,
17 East 49th Street
New York 17, New York

RE: I.L.F.Y. Co. v. Rent Commission
Premises: 320 East 57th Street
Docket AO 101095

Dear Mr. Fougner:

This will acknowledge receipt of your letter dated September 19, 1961, with reference to the above matter, in which you state:

"This letter is addressed to you merely for purposes of clarifying your interpretation of Chapter 337, Laws

Interpretative Letter of the Temporary State Housing Rent Commission (Appellate)

of 1961, as it applies to the fair return valuation on the property involved in the above case.

The record shows that this property was purchased February 20, 1961, at a price of $1,378,000. The equalized assessed value of the property is $909,000. While the application as originally filed at a date prior to the effectiveness of the 1961 amendment, requested a 6% return on the aforesaid purchase price, the mathematics demonstrate that the property is not earning a 6% return on the aforesaid equalized assessed value. The 1961 statute as sustained by the Court of Appeals prohibits the issuance of an order of rent adjustment earlier than February 20, 1962, or one year from the date of purchase in that the statute prescribes that 'No adjustment ordered by the Commission based upon such sales price valuation shall be effective prior to one year from the date of such sale.'

It is my understanding that you interpret the statute as likewise prohibiting the issuance of such an order for this property prior to February 20, 1962, even if the landlord requests the alternative reduced value represented by the equalized assessment. Would you kindly at your earliest convenience advise me (a) as to your interpretation concerning the foregoing question, (b) the basis for your interpretation. This letter is sent to you not necessarily because we disagree with your interpretation but merely to have the answer and reasoning for the record."

Prior to the 1957 extension of the Rent Law, the Commission had the authority to adopt as the valuation base in a fair return proceeding either the equalized assessed

valuation of a property or its latest bona fide sales price since March 15, 1953. The 1957 amendment to the Law eliminated that discretion and mandated the valuation base to be the latest sales price since March 15, 1953. Only in the absence of a bona fide sale since March 15, 1953, was the equalized assessed valuation to be used. These provisions were unchanged in the 1959 amendment and modified in the 1961 extension of the Law only to the extent that the use of a bona fide sales was confined to those occurring on and after March 15, 1957.

Nowhere has the Legislature ever indicated that the discretionary authority taken from the Commission since the 1957, unaffected by special circumstances which distort the ferred to landlords or others. On the contrary, where a bona fide sale of the property has occurred since March 15, 1957 amendment to the Law has been or should be transsales price, it was legislatively determined that such sales price be the sole valuation base in fair return cases.

I trust the above fully answers your inquiry.

Very truly yours,

/s/ HAROLD ZUCKER
HAROLD ZUCKER
Counsel

HZ/jb

EXHIBIT 7

Appellee's Operational Bulletin Staying Final Action on Fair Return Cases

STATE OF NEW YORK
TEMPORARY STATE HOUSING
RENT COMMISSION
280 BROADWAY
NEW YORK 7, NEW YORK

October 30, 1961

Operational Bulletin No. ~~44~~—Statement by Governor Rockefeller

Appended hereto is the Statement by Governor Nelson A. Rockefeller released Sunday, October 29, 1961, on the subject of rent control and the Commission's review of all applications under the fair return provision of the Law to determine the effect of the 1961 equalization rates upon tenants.

Pending completion of the review, no final action on fair return applications [§ 33(5)] may be taken.

ROBERT E. HERMAN
Commissioner and
State Rent Administrator